



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

ELP

Docket No. 5913-99

2 August 2000

[REDACTED]

Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of Title 10, United States Code, Section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 12 July 2000. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice.

The microfiche records provided for the Board's review were incomplete. However, the Board found that you were appointed an ensign (O-1) in the Navy on 14 February 1997. Subsequently, you began flight training as a naval aviator.

Records furnished by your command and the Department of Veterans Affairs (DVA) reflect that on 27 March 1997, the car in which you were riding was involved in an automobile accident. Your car was rear ended and pushed into the car immediately in front of it. Although you were restrained, you reported that you were asleep at the time of collision and thrown into the dashboard, hitting both legs and your left knee, and also hitting the right side of your head against the car door or the window.

The medical record reflects that on 7 May 1997 you were seen for blunt trauma you received three weeks ago to your left shin. The examining doctor prescribed heat and massage, with a reevaluation

in 30 days and a discussion with an orthopedist if the pain did not subside. The medical record entry made no mention of the foregoing automobile accident.

On 15 May 1997, a flight surgeon noted in your medical record that you had been seen for bruising of both shins several weeks earlier after a motor vehicle accident. However, he also noted there was no entry documenting the accident in the medical record, and that you wanted a statement for filing a "pain and suffering claim" with the insurance company. The flight surgeon further noted that your activities were unrestricted and you were not grounded.

On 29 July 1997, a corpsman noted your complaints of headaches and an upset stomach during the past three days. Since it was believed that you might have a virus, you were given a "down chit," and prescribed Tylenol. Two days later, on follow-up, you reported no headaches. No mention was made of the foregoing motor vehicle accident. You were seen again for headaches on 20 August 1997 by a chief corpsman, who believed they were stress related. You were given a two day down-chit and prescribed Motrin. Your headaches had resolved by 25 August 1997 and you were returned to flight status.

The record reflects that you completed primary flight training on 15 December 1997 and were selected for further training in helicopters.

On 19 January 1998, you consulted a civilian doctor about headaches and knee pain. The doctor noted your reluctance to see the flight surgeon because of a concern that you would be permanently grounded. You reported occasional episodes of blurred vision and knee pain, which made it difficult to control the rudders and brakes in your aircraft. The doctor's assessment was a contusion of the knee with persistent pain, and possible post-concussive headaches. You were strongly encouraged to discuss these matters with the flight surgeon, and were referred for orthopedic and neurological evaluations.

On 20 January 1998, you received an unsatisfactory grade on "Synthetic RI-20 (Headwork)," and were counseled regarding this flight failure. You mentioned problems visualizing yourself "3-D in the air while around RI environment." You also said that you were motivated to continue the flight program and had no personal problems. The flight leader noted that it was odd that you could not remain oriented during your flight since you had approximately 25 flights (including supervised practices), and an experienced student should not have such a problem. Two supervised practices were recommended.

On 3 February 1998, you underwent an evaluation by a civilian neurologist for "daily headaches" in the aftermath of the automobile accident some ten months earlier. The neurologist noted that x-rays of the cervical spine and left knee and a computed tomography (CT) scan of the brain were normal. He also noted that you had concealed your symptoms from Navy flight surgeons and decided to pursue evaluation by civilian physicians, anticipating the need to eventually divulge your situation to the flight surgeon. You also said that you recently considered the possibility that you were "medically unfit" to fly. You told the doctor that on at least six to eight occasions you had visual blurring with "double vision," and that two of these episodes occurred while flying. None of these symptoms, including the headaches, seemed to correlate with acceleration or "G" forces. You also reported that your knee often ached "like hell", felt stiff and numb, and cause problems in operating the rudder. However, the doctor's review of your neurologic systems was entirely unremarkable. He stated that you had to make some decisions since he did not feel comfortable prescribing medication for headaches without the approval of the flight surgeons, because he would not take responsibility for problems that arose during flying due to "headache" medications. However, he did prescribe Midrin, subject to the approval of your flight surgeon.

On 23 February 1998 you received another unsatisfactory grade, this time on "RI-25 (flight planning)." You were again counseled and stated that there were no personal problems affecting your performance. The following day a progress review board (PRB) convened as a result of your "flight planning" and "headwork" failures. At the PRB, you responded to a number of mandatory questions from the applicable instruction, and to specific questions from each of the board members. The PRB reported that you were slow in responding and gave incorrect answers to virtually all of the questions. The PRB recommended that you be removed from flight training given your past flight performance and poor performance before the board. Although the commanding officer (CO) agreed with the PRB's findings, he disagreed with its recommendation for removal and recommended that a special instrument review board be convened. On 11 March 1998, an instrument review board voted to retain you provided that you received no further unsatisfactory grades.

On 23 March 1998, during an interview with the flight leader, you disclosed that you were in an automobile accident that caused blurred vision and severe headaches and could have contributed to your substandard performance. You stated that you had kept this information from the military authorities in an effort to prevent termination of your flight training. The flight leader then concluded that you should be removed from flight training.

On 30 March 1998 you appeared before a second PRB and said that your poor performance was due to severe headaches and knee problems which resulted from a car accident. You also stated that you told a flight surgeon about the accident after it occurred, but later pursued civilian medical treatment because the "military did not seem too concerned." When questioned as to why you did not so inform the previous PRB, you replied that you did not think it was a problem at the time. When questioned about flying when you were suffering from severe headaches and leg pain, you replied that you had no excuse. The PRB concluded that you had not been totally honest about your symptoms from the car accident, and used bad judgment in pursuing civilian medical help and continuing to fly with severe headaches. The PRB recommended that you be removed from the flight program and referred for further medical evaluation, and the CO concurred with these recommendations.

On 2 April 1998 you returned to the civilian neurologist for a follow-up examination regarding your headaches. The neurologist noted that you reported that the previous prescribed Midrin was a "total failure", and you were now convinced that you were "medically unfit" to fly. You reported that you suffered from headaches two to three times a day that resulted in severe visual blurring and impaired concentration when studying the plane's instrument panel. However, the doctor noted your neurologic examination remained normal, and said that he had another long discussion with you regarding the use of medication while flying, and the need for the flight surgeon's involvement. You were given a prescription for Niacin. An electroencephalogram (EEG) was later reported to be normal.

In June and July 1998, you underwent psychological testing and neuropsychological and psychiatric evaluations. On 17 July 1998, the flight surgeon provided a summary of the medical evaluations for the headaches and knee pain, and stated that the neuropsychiatric testing revealed the following:

CT scan of the brain on 8 January 1998 was read as within normal limits

Normal neurologic examination on 3 February 1998 and 7 May 1998 respectively by two independent neurologists.

EEG on 8 April 1998 was read as within normal limits.

Cognitive testing on 23 June 1998 was assessed as severely impaired performance in all areas, specifically speed, accuracy, through-put and process. Medication toxicity was ruled out.

Neuropsychological evaluation conducted on 29-30 June 1998 did not demonstrate evidence of neurological or psychological impairment. Said testing suggested that your performance was not commensurate with your ability.

Psychiatric evaluation on 1 July 1998 found you without Axis I or Axis II diagnoses and fit for general military service.

The flight surgeon noted that you had been noncompliant with respect to amitriptyline prescribed for chronic headaches since blood levels were below the detection threshold on 2 and 23 June 1998. With regard to your chronic left knee pain, evaluations included the following:

X-rays of the left knee, left tibia, and left fibula on 7 January 1998, read as no gross effusions. Knee appears normal.

Magnetic Resonance Imaging (MRI) of the left knee on 10 February was read as: (a) tear of the posterior horn of the medial meniscus; (b) intact ligamentous structures and lateral meniscus; and (c) suspect lateral facet patellar chondromalacia.

Bone scan of the left knee on 11 June 1998 was non-diagnostic.

The flight surgeon noted that with the exception of item (b) of the MRI, the findings were not corroborated by two separate USN radiologists and the treating orthopedic surgeon. He stated that reliable witnesses, including himself, observed that you were not utilizing your cane and knee brace during off-duty hours. When offered diagnostic arthroscopy, you declined, opting to continue with physical therapy.

The flight surgeon concluded that the headaches were not manifestations of brain injury or neurologic dysfunction. The knee pain was assessed as a possible mild patellofemoral syndrome. He also concluded that you failed to take the prescribed medications. The flight surgeon planned to continue to monitor and treat your headaches, provided that you participated fully in your health care, and to continue physical therapy, if desired. You were found fit for general duty.

It appears that the air wing commander then ordered an investigation into your possible misconduct. On 24 August 1998, an investigating officer (IO) concluded that you sought civilian medical attention without informing military physicians and took medication prescribed by a civilian physician without obtaining the authority of a qualified flight surgeon. He further found that you continued to fly after admitting to a civilian physician

that you were unfit to do so. He also noted that you told the civilian neurologist that during flight, you were having difficulty operating the rudder pedal, and suffered from episodes of blurred and double vision. The IO also stated that you violated a regulation when you failed to inform anyone in the chain-of-command of your difficulties while flying. The IO further noted that you never discussed the headaches with the flight surgeon, did not use the cane and leg brace 100 percent of the time, and declined diagnostic arthroscopy.

The investigating officer opined that your claims of pain were not supported by objective medical documentation, and you were not taking a certain medication since it was not detectable in a blood test. He stated that your refusal to undergo low-risk diagnostic arthroscopy suggested that you were either not intent on a full recovery or were concerned that a non-existent medical condition would be discovered. He also noted that witnesses stated that you often used a cane and brace at work, but not off-base. Further, several individuals claimed that you did not want to fly helicopters, and after being selected for that aircraft, your knee condition worsened and you sought medical attention from civilian sources. The IO recommended that you receive nonjudicial punishment (NJP) for malingering.

On 31 August 1998 you were charged with dereliction of duty by flying after experiencing blurred and double vision, failure to obey a regulation by taking drugs prescribed by a civilian doctor without approval of the flight surgeon, and failing to report your physical indisposition to superiors and assuming flight duty when you were unfit to do so, all in violation of Article 92 of the Uniform Code of Military Justice (UCMJ); and avoiding duty by feigning a head and knee injuries, in violation of UCMJ Article 115.

On 16 September 1998 you submitted a statement in response to the alleged violations to the effect that the blurred vision you experienced while flying was not serious because it went away after a short period of continuous blinking. You also said that you would not "push it" if you were not up to flying because of a headache, you used the medication prescribed by the neurologist two or three times only while you were in ground school, and you discontinued using the medication when you received no benefit from it. Additionally you contended that you were never informed that taking the medication was in violation of a regulation, and the flight surgeons apparently did not think your headaches were very serious because they never ordered any of the tests you wanted, even though you reported these headaches numerous times. You argued that you only went to civilian doctors when the headaches became worse and you could no longer function properly. You asserted you were not feigning any pain or injuries and pointed out that the MRI clearly depicts a meniscus tear in the

knee and chondromalacia, and that neurological tests showed that your concentration and attention were impaired by the headaches. You claimed that the flight surgeon said you that you were within your right to seek outside medical treatment if you were not satisfied with the Navy's treatment, and that Navy doctors did nothing to treat your injuries. You also denied telling the neurologist that you knew you were medically unfit to fly, and implied the neurologist was retaliating because he was irritated that you asked so many questions. You explained the inconsistent use of the cane and knee brace and said that you discontinued using Elavil, prescribed by Navy doctors, because it made you dizzy. You asserted that you provided details of the automobile accident to a flight surgeon on 7 May 1997, and were not responsible for what he documented in the medical record. You said that the civilian neurologist took the information you provided out of context. You stated that you declined surgery because it would have set you further back, and you wanted to give physical therapy a chance. You dismissed as mere speculation the statements alleging that you did not want to fly helicopters.

On the same day of the foregoing statement, you received NJP. The NJP authority dismissed the specification of malingering, but found that the specifications of dereliction of duty and failure to obey a regulation were substantiated. Punishment consisted of a punitive letter of reprimand and 14 days of restriction.

On 21 September 1998, you appealed the NJP and argued that if the headaches were serious enough to cause double vision, they were serious enough for a thorough medical examination and associated tests by Navy doctors. You asserted that the Navy breached its contract by failing to provide you with the necessary care which would have allowed you to continue flight training. As a result, you had to seek treatment from a civilian doctor. Although you admitted to poor judgment, you asserted that the finding of guilty was not supported by a preponderance of the evidence.

On 22 September 1998, the NJP authority recommended that your appeal be denied and stated that knowledge of a general regulation was not a necessary element of failure to obey the regulation. He noted, however, that all students are briefed on the instruction you violated in aviation pre-flight indoctrination. With respect to failing to report your physical problems to superiors and assuming flight duty when not fit to do so, the NJP authority noted that at the time you sought treatment from a civilian doctor in February 1998, you had not revealed the accident or your true medical condition to any military authority. Only after you were being considered for removal from the flight program was this information provided. Even your civilian doctor was concerned that you concealed the medical conditions from your flight surgeon. The NJP authority concluded

that this callous disregard for safety put the aircraft, the instructor and yourself at risk.

On 22 September 1998, the appeal authority found that the specifications alleging failure to obey a lawful order were more accurately pled as part of the specification alleging dereliction of duty. Accordingly, all of the specifications were changed to a single specification alleging dereliction of duty. The appeal authority found sufficient evidence to support a finding of guilty of the modified charge and specification. Upon reassessment of the sentence, the punishment was found to be neither unjust nor disproportionate to the offense, and your appeal was otherwise denied.

On 22 October 1998, a report of the NJP was made to the Chief of Naval Personnel which stated that your misconduct warranted a delay in your promotion, and you were not recommended for retention. You submitted a statement with the report of NJP. On 9 December 1998, the Chief of Naval Air Training concurred with the recommendation that you not be retained and noted that you had submitted an unqualified letter of resignation dated 27 October 1998.

On 12 February 1999, the Chief of Naval Personnel (CNP) advised that since you had not completed your minimum service requirement, your voluntary resignation had been denied. CNP also advised that the show cause authority had reviewed your case and determined there was sufficient evidence to justify an involuntary separation from the naval service based on misconduct due to commission of a military offense, specifically, dereliction of duty, as evidenced by your NJP of 16 September 1998; and substandard performance of duty for failure to demonstrate acceptable qualities of leadership required of an officer in your grade and failure to conform to prescribed standards of military deportment, as evidenced by the NJP. You were advised of your procedural rights and that the recommended characterization of service was honorable.

On 23 February 1999 you tendered an unqualified resignation for an honorable discharge in lieu of separation processing, stating that you suffered from severe headaches and knee pain as a result of head and knee injuries sustained in an automobile accident shortly after entering flight training. On 10 March 1999, CNP recommended to the Secretary of the Navy that you be separated with an honorable discharge by reason of unacceptable conduct. The Assistant Secretary of the Navy for Manpower and Reserve Affairs approved the recommendation on 15 March 1999. You were so discharged on 30 April 1999.

On 9 August 1999, the Department of Veterans Affairs granted you a combined 20 percent disability rating for "residuals, tear



posterior horn medial meniscus left knee," "headaches secondary to trauma," "residuals, excision of neck cysts," and "anterior spurting C5-6, cervical spine."

Your application indicates that you want the reason for discharge changed from misconduct to a medical discharge. In order for such a change to be made, the record would have to be corrected to show that you were separated for physical disability. On 15 November 1999 you were requested to clarify your request. On 26 November 1999 you advised the Board that you were not seeking disability from the Navy, but only desired that the reason for discharge shown on the DD Form 214 be changed to one without a negative connotation.

In its review of your application, the Board conducted a careful search of your service and medical records for any mitigating factors which might warrant a change in the reason for your discharge. However, no justification for such a change could be found. The Board specifically noted the comprehensive medical and neurological evaluations conducted subsequent to your discharge by private physicians that show you continue to suffer from the disabling effects of headaches and knee pain, and the notarized copies of the prescriptions written by the civilian neurologist you consulted prior to discharge. You contend that you found these prescriptions after you moved from your residence in Pensacola, and since the prescriptions were never filled, you should not have been found guilty of taking these medications. You allege that you repeatedly told Navy authorities that you never took these medications, but they refused to believe you since you could not find the prescriptions until now; and you were told that you could either admit to taking the medications and accept NJP or maintain your innocence and face a court-martial.

Your contention that you never took any of the medications prescribed by the civilian neurologist is not supported by the evidence of record. The record shows you told the a civilian neurologist on 2 April 1998 that you took Midrin but it was not helpful and on 16 September 1998 you admitted you took this medication two or three times. Even if you were not flying but only took the medication while in ground school, this is immaterial since you were still in flight training and Navy doctors were responsible for your care, a fact certainly understood by the civilian doctors who evaluated you. The Board noted that you received NJP and were discharged not just for taking this medication, but also for flying when you were unfit to do so and failing to report your medical condition to the military authorities. The Board believed that you should have reported the automobile accident to military authorities at the

earliest opportunity. The Board found it disturbing that the military authorities apparently did not become aware of the accident and the related medical problems until some 10 months after it occurred. It appeared to the Board that you probably reported only limited information surrounding the accident and minimized the extent of your injuries to medical authorities since the two civilian doctors you consulted specifically noted you were reluctant to divulge your symptoms to Navy flight surgeons for fear that flight training would be terminated. You certainly had a right to consult civilian doctors, but you also had a both a moral and professional responsibility to inform the chain of command when you began to experience difficulties, such as the headaches, the blurred and double vision, and the knee pain. Available records contain no evidence that you informed the chain of command of these medical problems until you were faced with your removal from flight training, and you have provided no such evidence.

The Board noted that you were advised by the discharge authority that there was sufficient evidence to involuntarily separate you for misconduct and substandard performance. The narrative reason "Unacceptable Conduct" is assigned for acts of moral and/or professional dereliction not otherwise listed in the instruction governing the narrative reasons for separation to be shown on the DD Form 214. Your failure to reveal the details of your true medical condition to the chain of command in a timely manner jeopardized the safety of the aircraft, the flight instructor, and yourself. Had you reported the blurred and double vision to the flight instructor the first time you experienced it, the chain of command would have readily ensured you were properly and thoroughly evaluated. Despite your contestations to the contrary, the evidence of record indicates that you reported that you believed you were unfit to fly to a civilian neurologist. While your fear of removal from flight training is understandable, it did not excuse you from the responsibility to report this information to medical authorities and the chain of command. The Board concluded, as did the PRB, that you were not totally honest with your command. Officers are held to a higher standard because they are expected to possess the character, integrity and courage to put their own interests aside for those of the Navy. The Board found no error or injustice in the reason for discharge since it is least stigmatizing reason authorized by the regulation for misconduct. The fact that it may be embarrassing or prejudicial does not provide a valid basis for changing it. The Board concluded that the reason for discharge was proper and no change is warranted.

Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request. It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the

Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER  
Executive Director